January 14, 2004

D.T.E. 98-AD-11

Adjudicatory hearing in the matter of the complaint of Veronica Bell relative to electric bills rendered by Hingham Municipal Lighting Plant due to her alleged violation of the Sanitary Code, 105 C.M.R. §§ 410.254 and 410.354.

APPEARANCES: Veronica Bell
933 Peach Avenue, No. 4
El Cajon, California 92021
Complainant

Joseph R. Spadea, Jr., General Manager
Hingham Municipal Lighting Plant
222 Central Street
Hingham, Massachusetts 02043
Respondent

Cheryl A. Thomas
548 Middle Street
East Weymouth, Massachusetts 02189
Tenant

I. INTRODUCTION

On August 13, 1997, an informal hearing was held before the Consumer Division ("Division") of the Department of Telecommunications and Energy ("Department") on the complaint of Veronica Bell ("Property Owner") disputing a bill based on an alleged violation of the State Sanitary Code ("Code"). The disputed bill was rendered to the Property Owner by Hingham Municipal Lighting Plant ("HMLP")[1] for electric service provided to her tenant, Cheryl A. Thomas ("Tenant"), residing at 60 Rhodes Circle, Hingham, Massachusetts ("Property"). The Property was an owner occupied duplex home. The Property Owner was dissatisfied with the informal hearing decision rendered on October 28, 1998, and requested an adjudicatory hearing before the Department pursuant to 220 C.M.R. § 25.02(4)(c). The matter was docketed as D.T.E. 98-AD-11.

Pursuant to notice duly issued, an adjudicatory hearing was held on February 26, 1999 at the Department's offices in Boston, in conformance with the Department's Regulations on Billing and Termination Procedures, 220 C.M.R. §§ 25.00 et. seq. The Property Owner testified on her own behalf along with her son, Daniel Bell. The Tenant testified on her own behalf. HMLP sponsored the testimony of its general manager, Joseph R. Spadea, Jr[2]. The

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[1] HMLP is a municipal electric plant established by the Town of Hingham under G.L. c. 164, § 34.

[2] Although not an attorney, Mr. Spadea appeared on behalf of HMLP. His appearance occurred before Interlocutory Order on Appeal of Hearing Officer Ruling, D.T.E. 01-36/02-20 (January 31, 2003) was issued, requiring that legal entities or persons be represented by counsel, save where a natural person appears pro se.

evidentiary record consists of four exhibits and responses to 13 record requests from the Property Owner, the Tenant and HMLP.[3]

II SUMMARY OF ISSUES

The Property Owner disputes a bill for $1,321.12[4] rendered to her by HMLP as a result of a violation of the State Sanitary Code ("Code"), 105 C.M.R. §§ 410.254 and 410.354, for the period March 31, 1995 through February 7, 1997 (RR-DTE-1g; DTE-RR-1i; DTE-RR-1j; Tr. at 26). The Board of Health for the Town of Hingham ("Board of Health") issued a citation to the Property Owner on February 7, 1997, because an exterior front flood light, a sump pump, and a common area cellar light were improperly connected to the Tenant's meter (RR-DTE-1i; RR-DTE-1j).

The Property Owner concedes that the Code violation existed, but contends that she settled the dispute by a signed letter from the Tenant ("Settlement Letter") and tender of a $150 check to the Tenant (Exhs. B-1, B-2; Tr. at 6-9, 16-17). The Property Owner claims that the appliances listed in the citation consumed a minimal amount of energy (Tr. at 25-26).

The Tenant maintains that she rescinded the Settlement Letter because the settlement check was not related to the Code violation, but rather represented reimbursement for repairs to her kitchen floor (RR-DTE-1e; Tr. at 48, 55-57). The Tenant asserts that the amount of

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[3] On May 2, 2001 and May 9, 2001, respectively, the Tenant and Property Owner responded to post-hearing record requests from the Department.

[4] The outstanding balance on the account ($1,321.12) calculated by HMLP included the Tenant's usage for March 1997 and the Property Owner's usage for April 1997. The actual amount in dispute is $1,223.78 which represents the Tenant's usage during the period of the Code violation from March 31, 1995 through February 7, 1997 (RR-DTE-1; Tr. at 34, 60, 67).

energy consumed by the appliances but not attributable to her usage was considerably higher than the Property Owner's estimate (RR-DTE-2-T; Tr. at 11, 47, 50-51, 68-69).

III. SUMMARY OF TESTIMONY

A. The Property Owner

The Property Owner testified that she leased part of her owner occupied duplex home to the Tenant under a month-to month tenancy-at-will between October 1994 and March 1997 (Tr. at 34). The Property Owner stated that she received a citation from the Board of Health on February 7, 1997, which indicated that a Code violation existed because the exterior front flood light, a sump pump and a common area cellar light were connected to the Tenant's meter (Tr. at 7-8, 20; RR-DTE-1j). The Property Owner testified that she did not contest the Code violation (Tr. at 24, 35). She maintains instead that the dispute was resolved by a signed Settlement Letter from the Tenant (id. at 24, 26; Exh. B-1). The Property Owner further testified that the Settlement Letter was supported by her tender and the Tenant's endorsement of a settlement check, dated March 25, 1997 in the amount of $150 (Exh. B-2). The Property Owner maintains that the Settlement Letter and settlement check were prepared and filed in accordance with instructions from the Board of Health as settlement of the Code violation (Tr. at 7-9).

With regard to the installation and usage of exterior front flood lights, the Property Owner testified that the floodlights were installed at the Tenant's request in the Fall of 1996 (RR-DTE-2-B; Tr. at 18). The Property Owner further testified that the floodlights referenced in the Code violation were equipped with two 75-watt bulbs set on motion detectors

(Tr. at 35-36). The Property Owner asserts that the exterior flood lights were activated for only one minute when someone entered the driveway and estimated an average use of three minutes per night (RR-DTE-2-B; Tr. at 35-36).

As to the operation and usage of the sump pump referenced in the Code violation, the Property Owner testified that it was a removable appliance that was located in a hole in the corner of her garage (Tr. at 24-25).[5] The Property Owner estimated that the sump pump was used approximately three to five times, for a total of three hours (RR-DTE-2-B; Tr. at 24-25). The Property Owner claimed that the sump pump was not plugged in all the time and therefore was not a running sump pump (Tr. at 70). The Property Owner also testified that the sump pump had a small float that automatically shut the pump off after running for 30 seconds (id. at 42).

The Property Owner stated that the common area cellar light was equipped with one 60-watt bulb (RR-DTE-2-B). The Property Owner estimated the average usage as one-half hour every other day (id.).

The Property Owner contends that she should not be liable for the Tenant's entire electric bill for the period in question but rather, only for the portion attributable to the exterior front flood light, sump pump, and common area cellar light (Tr. 24-26).

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[5] According to the Property Owner, she purchased the sump pump in the Summer of 1996 (RR-DTE-2-B). The Flowtec pedestal sump pump dimensions are as follows: 32" high, 5" wide, 4' cord, 3" round float, 3" shut off level, 48y flow rate, 1/3 horsepower, 5.3 amps (id.).

B. The Tenant

The Tenant testified that the term of her tenancy was from October 1994 through March 1997 (id. at 67). The Tenant stated, however, that the disputed electricity usage commenced in March 1995 (id. at 68). The Tenant acknowledged that she gave the Property Owner a Settlement Letter and cashed the Property Owner's $150 check (Exhs. B-1, B-2; Tr. at 12, 28, 54). The Tenant, however, asserts that the check was intended to be payment for $140 in repairs to her floor and she expected a second check in the amount of $150 to settle the Code violation dispute (Tr. at 12, 28, 52, 54).[6]

As to the installation and usage of the exterior front flood lights, the Tenant testified that the Property Owner installed the exterior front flood lights in June 1995 (RR-DTE-2-T). The Tenant claims that the lights came on in response to any movement and were constantly illuminated throughout the day and night (id.).

Regarding the operation and usage of the sump pump, the Tenant acknowledged that the sump pump was located in a hole in the garage and would fall over if left plugged in (id.). The Tenant estimated that the sump pump was operating about six or seven times per year (id.). The Tenant claims the sump pump did not shut off on its own, but ran continuously throughout the day and night (id.; Tr. at 47). She also testified that there were numerous times that her husband had to shut the sump pump off because it was making a sound in the drain (id.).

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[6] The Tenant testified that she wrote a letter to the Board of Health attempting to nullify the Settlement Letter (RR-DTE-1e; Tr. at 56-57).

As for the usage of the common area cellar light, the Tenant contends that it was equipped with one 100-watt bulb (RR-DTE-2-T). The Tenant maintains that the common area cellar light was in constant use every day and night (id.).

C. Hingham Municipal Lighting Plant

HMLP stated that it was notified by the Board of Health on February 7, 1997 that, as a result of a complaint filed by the Tenant, the Property was inspected by the Board of Health on February 6, 1997, and a Code violation was found (RR-DTE-1a). HMLP stated that it calculated that the usage in dispute covered the period from March 31, 1995[7] through February 7, 1997 and determined that there was an outstanding balance on the account of $1,321.12[8] (RR-DTE-1; Tr. at 60). HMLP issued a bill to the Property Owner for that amount, pursuant to 220 C.M.R. § 29.06.

HMLP testified that flood lights are usually automatically disabled by controls to prevent usage in the daytime (Tr. at 65). HMLP also stated that HMLP's rate per kilowatt hour was ten cents (Tr. at 86).[9]

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[7] March 31, 1995, is the date on which, HMLP reports, the Tenant became its customer of record for billing purposes (Tr. at 60).

[8] The amount $1,321.12 includes the amount in dispute ($1,223.78) representing the Tenant's usage for the period of the Code violation from March 31, 1995 through February 7, 1997, plus $97.34 which includes the Tenant's usage for March 1997 and the Property Owner's usage for April 1997 (RR-DTE-1; Tr. at 34, 60, 67).

[9] HMLP explained that a hundred-watt bulb running for ten hours would constitute a kilowatt hour (Tr. at 86).

HMLP estimated that the motor of the sump pump was a one-third horsepower (Tr. at 65). HMLP also explained that if the sump pump malfunctioned, it would make a sucking sound and could continue to run for some period of time (id.)

IV. STANDARD OF REVIEW

The Sanitary Code, 105 C.M.R. § 410.354 provides in part:

> (A) The owner shall provide the electricity and gas used in each dwelling unit unless:
> (1) Such gas or electricity is metered through a meter which serves only the dwelling unit or other area under the exclusive use of an occupant of that dwelling unit, except as allowed by 105 C.M.R. 410.254(B); and
> (2) A written letting agreement provides for payment by the occupant.
>
> (B) If the owner is required, by 105 C.M.R. 410.000 or by a written letting agreement consistent with 105 C.M.R. 410.000, to pay for the electricity or gas used in a dwelling unit, then such electricity or gas may be metered through meters which serve more than one dwelling unit.
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> (C) If the owner is not required to pay for the electricity or gas used in a dwelling unit, then the owner shall install and maintain wiring and piping so that any such electricity or gas used in the dwelling unit is metered through meters which serve only such dwelling unit, except as allowed by 105 C.M.R. 410.254(B).
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> In addition, 105 C.M.R. § 410.254 provides in pertinent part:
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> (B) In a dwelling containing three or fewer dwelling units, the light fixtures used to illuminate a common hallway, passageway, foyer and/or stairway may be wired to the electric service serving an adjacent dwelling unit provided that if the occupant of such dwelling unit is responsible for paying for the electric service to such dwelling unit:
> (1) a written agreement shall state that the occupant is responsible for paying for light in the common hallway, passageway, foyer and/or stairway; and
> (2) the owner shall notify the occupants of the other dwelling units.

It is well settled that the Department has jurisdiction to enforce these provisions of the Code, because no substantive or jurisdictional conflict exists between the Department's

authority and the authority of the Certifying Agency[10] which makes a finding whether a Code violation exists. Folloni v. Eastern Edsion Company, D.P.U. 92-AD-45 (1994); Eastern Edison Company v. Prybuszaukas, D.P.U. 84-86-64, at 5 (1985); Eastern Edison Company v. MacDonald, D.P.U. 84-86-59, at 5 (1985).

In determining the party responsible for payment for utility service where a violation of the Code is alleged, the Department will not re-litigate the facts underlying a finding of a Code violation but will accept documentation by a Certifying Agency as probative evidence of the violation. Cahill v. Boston Edison Company, D.P.U. 88-AD-6, at 5-6 (1990). A citation issued by a Certifying Agency to the property owner is presumed accurate, and parties may not contest the accuracy of a citation before the Department. 220 C.M.R. § 29.04(1). Similarly, the Department will not re-litigate the facts underlying a recission of a citation for a Sanitary Code violation. DeAngelo v. Massachusetts Electric Company, D.P.U. 90-AD-10 (1995); Kamarinos v. Massachusetts Electric Company, D.P.U. 90-AD-9 (1994).

As noted, the Code provides that the owner of a residential building must pay for electricity when it is not metered through a single meter serving only one dwelling unit. D.P.U. 84-86-64, at 5; D.P.U. 84-86-59, at 4. The Department has held that any contractual arrangement between the landlord and the tenant for utility service, i.e., a lease agreement, is superseded by the landlord's warranty that rental units are in compliance with the Code. D.P.U. 88-AD-6, at 7; D.P.U. 84-86-59, at 5. The Department has also held that it would be

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[10] A Certifying Agency is defined as a state, city or town agency mandated to enforce the Sanitary Code regulations pursuant to 105 C.M.R. §§ 410.354 and 410.254 220 C.M.R. § 29(03).

inappropriate to permit a utility or a G.L. c. 164, § 34 municipal electric plant to enforce a contract for service against a person who, as a matter of public policy, is without liability. D.P.U. 84-86-64, at 5; D.P.U. 84-86-59, at 5.

Before September 27, 1994, in the event of a Code violation, the Department did not apportion the tenant's bill between the tenant and the landlord. D.P.U. 88-AD-6, at 6; see generally D.P.U. 84-86-64; D.P.U. 84-86-59. On September 27, 1994, the Department adopted regulations entitled "Billing Procedures for Residential Rental Property Owners Cited for Violation of the State Sanitary Code 105 C.M.R. § 410.354 or 410.254," which became effective on October 21, 1994. Sanitary Code Rulemaking, D.P.U. 90-280 (1994); 220 C.M.R. § 29.00 et seq. These regulations provide, among other things, that in instances of minimal use, as defined by the regulations, property owners will not be necessarily responsible for the full cost of electric or gas service provided to the tenant customer for the retroactive period of the violation of the Sanitary Code, but may be held responsible for paying the cost of operating those electric or gas appliances, outlets, or other energy consumption sources cited by the Certifying Agency as wrongfully connected to the meter serving the dwelling unit of the tenant customer for the retroactive period of the Code violation. 220 C.M.R. § 29.08; see D.P.U. 90-280, at 5.

Accordingly, relative to requests to appeal the informal decision of the Department's Consumer Division filed on or after October 21, 1994, the effective date of the above regulation, the Department will determine whether and how to apportion the tenant's bill between the tenant and the landlord in instances of minimal use.

220 C.M.R. § 29.08 provides in part:

> (1) Minimal Use Violation(s).
> A Code violation(s) that individually or in the aggregate includes interior and/or exterior common area illumination (excluding exterior flood light(s)), smoke, fire and/or security alarm(s), door bell(s), cooking range, and common area electrical outlets. If any one or all of these energy users are cited by the Certifying Agency as wrongfully connected to the meter serving the dwelling unit of the tenant customer, provided the Certifying Agency has not also cited the wrongful connection of heating, air conditioning, hot water heating, electrical pump(s), clothes dryer, refrigerator or freezer on the meter serving the dwelling unit, the utility company shall bill the property owner $10.00 per month for the retroactive time period determined pursuant to 220 C.M.R. 29.07(1).

The purpose of the Code is not to penalize unduly an owner of a dwelling or to profit unduly a tenant in a dwelling because of Code violations. See Commonwealth v. Haddad, 364 Mass. 795, 799 (1974) (holding that the primary purpose of the Code is to prevent violations). Furthermore, the Department may grant an exception to any provision of 220 C.M.R. § 29.00. Whether or not the Department finds that the Code violation is a minimal use violation, the Department may where appropriate apportion the bill between the tenant and landlord if the result under 220 C.M.R. § 29.00 et seq. would otherwise unfairly and unduly profit or penalize either party. Moruzzi v. Commonwealth Gas Company, D.P.U./D.T.E. 96-AD-6, at 12-13 (2001).

The time period[11] that the property owner is responsible for paying for service previously billed to the tenant resulting from a Code violation is set forth in 220 C.M.R. § 29.07, which states in part:

> (1) Time Period. A utility company shall determine the time period of the property owner's responsibility for paying for service previously billed to the tenant customer resulting from the Sanitary Code violation(s) pursuant to 105 C.M.R. § 410.354 and/or 105 C.M.R. § 410.254 as the lesser of (a), (b) or ©):
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> (a) By calculating back two (2) years from the effective date of the citation, pursuant to 220 C.M.R. § 29.04(2); or
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> (b) By referencing back to the date that the tenant customer became customer of record for service to the dwelling unit that is subject of the violation; or
>
> (c) By reviewing [the] billing history for the dwelling unit that is the subject of the violation over a two (2) year period back from the effective date of the citation, pursuant to 220 C.M.R. § 29.04(2) to determine the approximate date of commencement of the Sanitary Code violation(s).

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[11] Historically, the specific beginning date of the landlord's responsibility was determined by the policy and practice, as stated in the decision rendered by the Consumer Division of the Department, following an investigation pursuant to 220 C.M.R. § 25.02(4)(b). Folloni v. Eastern Edison Company, D.P.U. 92-AD-45, at 10-11 (1994). For example, from January, 1992 to October 22, 1994, if a tenancy was for a period greater than two years, the landlord's responsibility began at a point two years prior to the date of the notice of the Sanitary Code violation. Prior to January 1992, if the tenancy began as much as six years prior to the date of the notice of the Sanitary Code violation, a landlord could be held responsible for a period not to exceed six years. Generally, where there was no evidence as to when the Sanitary Code violation commenced, the landlord's responsibility for electric or gas charges in situations of cross-wiring or cross-piping was calculated from the date the Sanitary Code became effective, September 1, 1983, or the date of the inception of the tenancy, whichever was later, and continued until the time the Sanitary Code violation was corrected, subject to certain time limits. See Krell v. Boston Edison, D.P.U. 91-AD-12 (1995); Tibbetts v. Massachusetts Electrical Company, D.P.U. 90-AD-20 (1993); Burns v. Massachusetts Electric Company, D.P.U. 85-13-9 (1985).

The precise ending date of the period of the Code violation is governed by 220 C.M.R. § 29.04(3). Specifically, that section states:

> (a) The effective date of correction of the violation(s) set forth in the citation shall be the actual date of reinspection of the dwelling as referenced in the written correction notice issued by the Certifying Agency to the property owner. The property owner shall give such correction notice to the utility company pursuant to 220 C.M.R. § 29.06(3)(e);
>
> (b) If the actual date of reinspection is not referenced in the correction notice, the effective date of the correction of the violation(s) set forth in the citation, shall be the date that appears on the face of the correction notice issued to the property owner;
>
> (c) If more than 30 days elapse between the effective date of the correction and the date of notice to the utility company of such correction, the property owner shall be responsible for paying for the electric or gas service provided to the tenant customer until the date that the property owner provides a copy of the correction notice to the utility company.

Unless additional cited violations of 105 C.M.R. § 410.354 and 105 C.M.R. § 410.254 existed in a tenant customer's dwelling unit, that tenant is not entitled to recover a reimbursement for utility payments if the violation pertains to electricity usage not registered on that tenant's meter. 220 C.M.R. § 29.12. That section provides a specific exception:

> When it is shown that some of the electricity and/or gas used in a dwelling unit was registered by a meter other than the meter serving the dwelling unit which is the subject of the violation, and the electric or gas company's records show that the tenant customer was not billed for such usage, the tenant customer shall not recover a reimbursement of utility payments on the basis of a Code citation as contemplated by 220 C.M.R. § 29.00.

Id.

V. ANALYSIS AND FINDINGS

The principal issues in this case are whether the Property Owner is obligated to pay the Tenant's electric bills incurred during the existence of a violation of the Sanitary Code and, if so, what is the extent and duration of the Property Owner's responsibility.

The Code clearly provides that the owner of a residential rental building must supply and pay for the electricity used in each dwelling unit unless the electricity is metered through a meter which serves only the dwelling unit, except as allowed by 105 C.M.R. § 410.254(B). In determining the party responsible for payment of utility service where a violation of the Code is alleged, the Department will not re-litigate the facts underlying a finding of a Code violation but will accept documentation by a Certifying Agency as probative evidence of the violation. Cahill v. Boston Edison Company, D.P.U. 88-AD-6, at 5-6 (1990). In the instant case, the Board of Health inspected the premises in question and found that an exterior front flood light, a sump pump, and a common area cellar light were improperly wired to the Tenant's meter. The Department therefore finds that a Code violation existed from March 31, 1995 through February 7, 1997.

We first consider the Property Owner's procedural argument that the Tenant is barred from obtaining a refund because of an alleged settlement. The Property Owner concedes that a Code violation existed, but argues that the Department should absolve her of any obligation to the Tenant as a result of the purported $150 settlement agreement. The Department has held that the existence of any contractual agreements between the landlord and the tenant for utility service, i.e., a lease agreement, is superseded by the landlord's warranty that rental units are in compliance with the Code. D.T.E./D.P.U. 96-AD-6, at 11; D.P.U. 95-AD-4, at 6;

D.P.U. 88-AD-6, at 7. The alleged settlement does not absolve the Property Owner of any obligations to provide utility service under 220 C.M.R. § 29.00 et. seq.[12] The Department therefore finds that the Property Owner is obligated to pay for electric service improperly billed to the Tenant.

The Department must next determine the extent of the electric service for which the Property Owner is obligated to pay[13]. Under 220 C.M.R. § 29.08(1), property owners are not responsible for the full cost of electric or gas service provided to the tenant, where the violation is determined to be a minimal use violation. Such a result would be disproportionate and thus inequitable. Therefore, the Department will determine whether and how to apportion the tenant's bill between the tenant and the landlord in what appears to be an instance of minimal use. In this case, the Property Owner was cited for a Code violation involving a common area cellar light, an exterior front flood light, and a sump pump.

The common area cellar light clearly falls within the definition of a minimal use violation under 220 C.M.R. § 29.08(1). The citation also generally identified the exterior front flood lights as a Code violation (RR-DTE-1j). Flood lights are specifically excluded from the minimal use provision under 220 C.M.R. § 29.08(1). However, the Property Owner testified that the exterior lights were equipped with two 75-watt bulbs and set on motion

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[12] We note that 105 C.M.R. § 410.254(B)(1) does provide for an occupant or tenant to pay for lighting common areas, but that provision is not at issue here.

[13] The controversy here concerns billing for usage from March 31, 1995 through February 7, 1997, nearly the end of the tenancy. The entire period falls under the revised rules of October 21, 1994. See D.P.U. 90-280 (1994); 220 C.M.R. § 29.00 et seq.

detectors for one minute intervals (Tr. at 36). HMLP explained that such exterior lights are usually automatically disabled by controls to prevent usage during the daytime (Tr. at 65). In Wilson v. Western Massachusetts Electric Company, D.P.U. 95-AD-16, at 18 (1996), the Department held that the minimal use provisions of 220 C.M.R. § 29.08(1) applied where the Health Inspector, "used the term 'floodlight' loosely and did not mean to suggest that the exterior lights were high-wattage, high-intensity or high-illumination lights." The Department finds that based on the evidence presented in the instant case, the lights referred to as 'floodlights' in the Town of Hingham Board of Health citation were not floodlights within the meaning of 220 C.M.R. § 29.08(1), but were actually exterior common area illumination lights. Consequently, the Department finds that the front exterior [flood] lights cited by the Board of Health meet the definition of a minimal use violation under 220 C.M.R. § 29.08(1).

The sump pump, however, does not meet the definition of a minimal use violation under 220 C.M.R. § 29.08(1). However, under 220 C.M.R. § 29.13, the Department may, wherever appropriate, grant an exception to any provisions of 220 C.M.R. § 29.00. The Department has stated that it is not the purpose of the Code to unduly penalize an owner of a dwelling or to unduly profit a tenant in a dwelling because of minimal Code violations. See Commonwealth v. Haddad, 368 Mass. 795, 799 (1974) (primary purpose of the Code is to prevent violations); Santana v. Boston Edison Company, D.P.U. 90-21-I (1992); Shimo v. Boston Edison Company, D.P.U. 90-30-I (1992); Moruzzi v. Commonwealth Gas Company, D.P.U./D.T.E 96-AD-6, at 12-13 (2001). In Moruzzi, the Department found that requiring the property owner to pay the tenant's entire gas bill for the period in question was unfair because it would unduly penalize the property owner and unduly profit the tenant.

D.P.U./D.T.E. 96-AD-6, at 13. In Moruzzi, the Department granted an exception to 220 C.M.R. §29.00 and apportioned the costs owed the company between the property owner and the tenant where appliances were improperly connected to the tenant's meter. Id.

In the instant case, the Property Owner testified that the sump pump was used three times for a total of three hours (RR-DTE-2-B). The Tenant maintains that the sump pump was used a minimum of six or seven times per year for varying, often continuous periods of time (RR-DTE-2-T). The Tenant also testified that there were numerous times that her husband had to shut the sump pump off because it was making a sound in the drain (Tr. at 47). HMLP explained that if a sump pump malfunctions, it will make a sound and continue to run for some period of time (Tr. at 66).

The Department calculated the wattage of the sump pump at 248.67 watts based on the horsepower of the sump pump.[14] The Department then applied the estimates to the wattage of the sump pump, and calculated costs for usage based on HMLP's rate of ten cents per kilowatt hour. The portion of the electric bill attributable to the sump pump based on these projections amounts to between $0.07 and $8.35 of the Tenant's total electric bill of $1,223.78. The $0.07 was calculated using the Property Owner's estimate of three hours of usage multiplied by the wattage of the sump pump. The $8.35 amount was calculated using the Tenant's estimate of 336 hours (14 days at 24 hours per day) of usage multiplied by the wattage of the sump pump.

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[14] One horsepower equals 748 watts. A sump pump with 1/3 horsepower equals 248.67 watts (Tr. at 15).

The evidence as to the amount of usage of the sump pump is conflicting and imprecise. However, based on the estimates derived from the evidence presented by the parties, the Department finds that the sump pump violation, while not minimal use by definition, is not sufficiently egregious to warrant requiring the Property Owner to pay the Tenant's entire electric bill, and therefore we make an exception to the definition of a minimal use violation under 220 C.M.R. § 29.13 for the sump pump. Based on the evidence presented in this case, in particular, HMLP's testimony that a sump pump would continue to run for some period of time if it malfunctioned, the Department finds it equitable to utilize the estimates of the Tenant in calculating the cost of usage. Therefore, we determine that the Property Owner will be required to pay an additional $8.35 attributable to the usage of the sump pump.

Finally, we calculate the Property Owner's total liability for the Code violation. First, we address the minimal use Code violation, that being the common area cellar light and front exterior light. The "minimal use" provision, 220 C.M.R. § 29.08, provides that "the utility company shall bill the property owner ten dollars ($10.00) per month for the retroactive time period determined pursuant to 220 C.M.R. § 29.07(1)." The Code violation commenced on March 31, 1995[15] when the Tenant became customer of record for the service to the dwelling unit that is the subject of the violation. 220 C.M.R. § 29.07(1)(a). Therefore, pursuant to 220 C.M.R. §29.07, the Department finds that the Property Owner's responsibility for a portion of the Tenant's electric bill commences on March 31, 1995 and extends through

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[15] The Department notes that the exterior front [flood] lights cited in the Code violation were not installed until approximately June 1995. This does not affect the calculation for the purposes of minimal use violations. 220 C.M.R. § 29.08.

February 7, 1997, the period of the Sanitary Code violation. Accordingly, the Property Owner is responsible for ten dollars ($10.00) per month for the 22-month, seven day time period from March 31, 1995 through February 7, 1997, for a liability of $222.50. As explained above, the Department finds that the Property Owner and Tenant should apportion the costs attributable to the usage of the sump pump, pursuant to 220 C.M.R. § 29.13. Therefore, in addition to the $222.50 amount owed by the Property Owner for the minimal use violation, the Property Owner is also responsible for an additional $8.35, amounting to a total liability of $230.85.

IV. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That the Property Owner, Veronica Bell shall pay to Hingham Municipal Lighting Plant the amount of $230.85. Any monies in excess of $230.85 which may have been paid on Ms. Bell's account in satisfaction of the disputed amount of $1,223.78 which was transferred to her account following the February 7, 1997 Sanitary Code violation, 105 C.M.R. §§410.254 and 410.354, shall be immediately refunded to Ms. Bell by Hingham Municipal Lighting Plant; and it is

FURTHER ORDERED: That Hingham Municipal Lighting Plant shall refund $230.85 to the Tenant, Cheryl Thomas.

By Order of the Department,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by filing a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).